APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 21,987

NATHAN FRED MARKS, *Appellant,*

v.

UNITED STATES OF AMERICA, *Appellee.*

[March 5, 1968]

Appeal from the Judgment of the United States District Court for the District of Oregon

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Before: CHAMBERS, BARNES and HAMLEY, Circuit Judges.

CHAMBERS, Circuit Judge:

Marks has been convicted by a jury for cheating on his 1961 federal income tax return: that is, he "did willfully and knowingly attempt to evade and defeat a large part of the income tax due and owing by him and his wife to the United States."

Taxpayer's return showed nothing due the government. As submitted to the jury, the government contended there was $2,099.81 in net taxable income and a tax due of $419.96.[1]

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[1] Marks was clearly entitled to an additional deduction of $222.38 for medical expenses. Thus, the government should have contended that the net taxable income was $1,877.43 and that the tax was $375.49. This mistake, we regard as de minimis.

This was not a net worth case. It was projected on the omission of specific items. And, the items added by the government as income revolve around the following sums:

1.	Received from Ford M. Converse ..	$ 850.00
2.	Received from Rudy Gross and United Finance Co.	750.00
3.	Received from Glenn Morningstar ..	755.00
4.	Received from Floyd Persons	4,000.00

Thus, if the defendant-appellant can knock out the fourth item, he would owe nothing. If he could knock out any two of items (1) to (3), the deficiency could hardly be called substantial.

Around the four foregoing items, the briefs for the most part swirl. Essentially defendant contended the items were loans. And, to some extent the face of the items confirmed the explanation. Certainly, without violating its oath, the jury could have found the defendant not guilty. But the fact that a jury properly could have found defendant innocent does not preclude there being evidence to convict beyond a reasonable doubt.

We have carefully examined each of the four transactions and agree that on each of them there was evidence to permit the transaction to go to the jury. The government's theory was two-pronged: The receipts were either compensation for services or money obtained by Marks under false pretenses. Either is taxable.[2] The $4,000 item looks more like false pretenses. The other items could be either compensation or false pretenses.

Counsel for appellant do an excellent piece of work in attacking the items, but we simply cannot agree with them that the evidence to convict was not there.

Rather late in the trial defendant came up with a contention that he was entitled a charitable deduction of

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[2] See U.S.C. § 61; United States v. Rochellee, 384 F. 2d 758.

$1,680.89 for the contents of a second hand store given to a police sponsored charity. On this item, a deduction, the burden of proof was on Marks. But the testimony was weak. And, the jury could have concluded the things had very little value. (In a motion for new trial, Marks, by affidavits, really does shore up the case for the deduction, but he submitted nothing not easily available at trial time.)

A contention is made that there was error in failing to instruct the jury as to the tax rate applicable to the claimed shortage of net taxable income. The expert had given his calculation of omitted income and his calculated amount of tax due. But, no one at any time gave the rate which appears to have been a flat 20%. There was no cross-examination as to rate. No one requested any instructions on it. If the failure to give the rate was error, no one called it to the court's attention. If error it be, we cannot call it fundamental error. There might be some error in it if a sharply progressive rate underlay the calculations.

A contention is made of failure to prove "corpus delicti" unless admissions of the defendant be used. Of course, the corpus delicti of an intent has to be proved ordinarily by circumstantial evidence. We find sufficient circumstances.

Very skillful counsel succeeded in acquitting defendant on two counts. They brought the shortage of unreported taxable income down to about a sixth of what the government claimed. Their brief, within the limits of proper advocacy, is both ingenious and dogged. We would write more if we thought it would convince them, but we are sure it would not. As it is, we do not feel justified in penalizing the subscribers to the Federal Reporter with a detailed discussion of the evidence.

The light sentence imposed reflects the trial court's conclusion that a small time wrongdoer, but nonetheless a wrongdoer, was caught and properly convicted.

Affirmed.

Judgment

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 21,987

NATHAN FRED MARKS, *Appellant*,

v.

UNITED STATES OF AMERICA, *Appellee*.

APPEAL from the United States District Court for the District of Oregon.

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the District of Oregon and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed.

Filed and entered March 5, 1968.

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF OREGON

No. CR 66-39

UNITED STATES OF AMERICA, *Plaintiff*,

v.

NATHAN FRED MARKS, *Defendant*.

Order

This matter is before the Court on defendant's motion for a judgment of acquittal and, in the alternate, for a new trial.

At the outset, I express the view that the defendant, on the record in this case, could well be likened to a miniature Ponzi. That in his relations with his victims, as shown by the testimony, he was a common cheat and a complete fraud, there is no doubt. How successful he was in his fraudulent schemes is clearly demonstrated by the fact that he ensnared not only the innocent, but also the "sharpies", including attorneys on the road to disbarment for somewhat similar schemes. His acquittal on Counts One and Two, in my opinion, can only be explained by the "blast" of the United States Court of Appeals for the Ninth Circuit against the Government's principal witness. This "blast" appeared in newspapers of wide circulation and on TV and radio on the fourth day of the trial.

Although I carefully cautioned the members of the jury against reading anything in the newspapers or listening to anything on TV or the radio about this case, I did not anticipate that the chief Government witness in this case

would be roundly criticized in connection with his testimony in another tax case. That some, if not all, of the members of the jury read or listened to this criticism is beyond question.

Be that as it may, defendant was convicted on only one count to evade and defeat a substantial part of his income tax. Neither the jury, nor the Court, is concerned with the defendant's fraudulent conduct, except insofar as it relates to the count on which the defendant was convicted.

One of the defendant's principal complaints is that the Court did not inform the jury on the tax rate to be applied in computing the tax deficiency. It is evident that neither the Government, nor defendant's counsel, were of the belief that these schedules and rates should be submitted to the jury. No requested instructions on that point were submitted, nor was the question in any way raised by the defendant. Obviously, at the time of the trial, all participants, including the Court, felt that the tax deficiency, if any, was a subject for expert testimony. Manifestly, the theory that the rate schedules should have been submitted to the jury is an afterthought on the part of counsel for defendant. The trial of the case consumed in excess of five days. I do not believe that the defendant should be now permitted to raise this question.

In any event, it is my view that it was not necessary for the Government to introduce evidence as to the exact amount of the additional tax due. The case is made when the Government presents substantial evidence from which the jury could find that a substantial amount *of net income* was not reported and that the failure to so report was willful and intentional. The amount of the additional income tax is not the important feature as long as it was a substantial sum. *Watts* v. *United States,* 212 F.2d 275 (10th Cir. 1954). Of similar import is *United States* v. *Nunan,* 236 F.2d 576 (2d Cir. 1956).

On the record before me, there is substantial evidence on which the jury could find that the defendant had willfully failed to report over $2,000.00 in taxable income on this particular count. Of course, the tax on such unreported income would be substantial.

There is no merit in the defendant's contention that he is entitled to the net loss carry-over for the year 1960 of M&M Salvage Company. This is a company which filed a separate corporate tax return and there is nothing in the record which supports defendant's theory that the corporation should be treated as a sham and its net loss carried forward to offset income on the defendant's individual tax return. The fact that the Government may have claimed that the Hedy Marks Foundation and Royal Acceptance Corporation were shams and that the defendant accepted the Government's theory on these two organizations, does not support a theory that M&M Salvage Company should likewise be treated as a sham. It should be added that this theory is also an afterthought on behalf of the defendant. No such theory was submitted at the time of the trial. Additionally, the tax return on which the defendant relies was offered in evidence and received for the specific purpose of countering the defendant's contention that he made a $2,500.00 charitable contribution. The exhibit would indicate that the property which was the basis of the alleged gift was of little, if any, value.

Obviously, the jury did not believe the testimony with reference to the value of the property involved in the alleged charitable gift. On the record, the jury might well find that the property involved in the gift was of little, if any, value.

I have carefully considered the voluminous briefs filed by counsel for defendant and have analyzed the cited cases. I am convinced that the case was properly submitted to the jury and that defendant had a fair trial. The alleged newly discovered evidence was obviously available to the

defendant at the time of trial. Moreover, such evidence would be only repetitive of that already in the record.

Therefore, the defendant's motion for a judgment of acquittal and, in the alternate, for a new trial, must be denied.

IT IS SO ORDERED.

DATED this 23rd day of November, 1966.

JOHN F. KILKENNY
District Judge